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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII, *Petitioner*,

v.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI

This brief *amici curiae* is submitted by the States of Alabama, *et al.*, pursuant to Rule 42(4) of the Rules of this Court. Amici are thirty-seven states of the United States and the City of New York, New York. For some years past, *amici*, in common with most of the states of the United States and many of the principal cities of the United States, have been increasingly con-

cerned with the direct effect of federal antitrust violations on their respective budgets, economies and citizens. *Amici*, consistent with their obligations to their citizens and in full accord with the federal policy of vigorous enforcement of the antitrust laws, have successfully prosecuted a number of important antitrust cases in recent years.[1] Other important antitrust cases instituted by *amici* are now pending in the lower federal courts. Among these are the so-called "Air Pollution" cases now pending before Judge Real in the United States District Court for the Central District of California pursuant to an order of the Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407.[2] In that case, *amici* seek both treble damages and injunctive relief [3] against the major manufacturers of automobiles. The sweeping, and we believe clearly wrong, opinion of the Ninth Circuit in this case may cast doubt on *amici's* efforts to obtain effective redress for the economic consequences of antitrust violations, and, we submit, clearly runs afoul of the Congressional policies which underlie the federal antitrust statutes. *Amici* agree with petitioner, the State of Hawaii, that its complaint stated a claim upon which relief can be granted and that the Court of Appeals erroneously directed dismissal of its complaint. Moreover, *amici* contend that regardless of the result in this particular case, the Court

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[1] E.g., *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2 Cir. 1971).

[2] *In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31 (C.D. Calif.), *app. pending* (9 Cir.).

[3] Among other relief, *amici* are seeking mandatory injunctive relief to require the Air Pollution defendants to install in their automobiles effective emission devices which, according to the allegations of the complaint, defendants unlawfully conspired and agreed not to develop or install.

below seriously misconceived the remedies available to states and other governmental bodies under the federal antitrust laws.

STATEMENT OF THE CASE

The State of Hawaii has presented a full statement of the case. For the broader overview which *amici* take, the relevant facts can be succinctly stated.

The State of Hawaii filed a complaint in an appropriate district court charging defendants with conspiring to fix and maintain unreasonably high prices for gasoline fuel, petroleum products and asphalt in the State of Hawaii. On its own behalf,[4] Hawaii sought two separate but related kinds of damages and injunctive relief.

In the first count of its complaint, Hawaii sought treble damages for the direct purchases of gasoline and asphalt which it had made. As to that, the parties and

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[4] In Count III of its complaint, Hawaii sought damages as a Rule 23 class representative on behalf of all of its citizens. The District Judge held that such a suit was "unmanageable" and declined to permit the case to proceed as a class action. The interlocutory certification which the District Court issued pursuant to 28 U.S.C. § 1292(b), and the interlocutory appeal which the Court of Appeals permitted, was limited to Count II of Hawaii's complaint. The Court of Appeals expressly declined to rule on the propriety of the trial court's class action ruling. 431 F.2d at 1283 n.3, 1285 n.6. Accordingly, *amici* do not here pursue the class action issues. Instead, we merely note that cases decided since the District Court's class action ruling in this case cast considerable doubt on the "manageability" conclusion. *E.g.*, *In re Antibiotic Drugs*, 1971 Trade Cas. ¶ 73,481 (S.D.N.Y., Feb. 17, 1971); *Eisen* v. *Carlisle & Jacquelin*, 1971 Trade Cas. ¶ 73,563 (S.D.N.Y., April 7, 1971). Rule 23(c)(1) provides that class action orders "may be altered or amended before decision on the merits," and we assume that the District Judge will give careful consideration to a renewed class action motion in light of the intervening authorities.

the courts below are agreed that Hawaii stated a claim upon which relief could be granted, and that, accordingly, a trial must be held at which defendants' liability will be adjudicated. That count is not in issue here.

The second count of Hawaii's complaint sought damages for injuries to the "economy and prosperity of the State of Hawaii." Hawaii's complaint was specific on this score. It alleged, *inter alia*, that as a direct and proximate result of the defendants' antitrust violations "revenues of [Hawaii's] citizens have been wrongfully extracted from [Hawaii's economy]"; that Hawaii's "economy has been held in a state of arrested development" due, in part, to the curtailment of "manufacturing, shipping and commerce" in the State of Hawaii; and that the resulting high costs of manufacturing precluded Hawaii's ability to compete with the products manufactured in other states. The District Judge, in a careful opinion, concluded that this branch of Hawaii's complaint stated a claim upon which relief could be granted.[5] On interlocutory appeal, however, the Court of Appeals disagreed and held that damage to a state's economy by virtue of antitrust violations is not "an injury to the business or property of the state or its people" and that, even if it were, the "at-

[5] In her third amended complaint, Hawaii had attempted to plead a claim as *parens patriae* to recover damages on behalf of her citizens, but the trial court dismissed with leave to amend, holding that a *parens patriae* claim had not been properly pleaded. The pleading now before this Court does not seek such recovery. As pleaded by Hawaii, as sustained by Judge Pence, and as treated by the Ninth Circuit, Count II of the fourth amended complaint seeks damages only for injuries to Hawaii's economy, thus stating a claim in the precise terms defined by this Court in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

tenuated injuries alleged by Hawaii are far outside the area of directness contemplated by the Clayton Act" (431 F.2d at 1285).

ARGUMENT

The Court of Appeals committed two fundamental errors. First, it failed to recognize that damage to a state's economy may indeed constitute damage to the state's business or property. Second, it held that, without regard to the facts of a particular case, damage to the economy is always too remote to be compensible under the federal antitrust laws.

Ever since *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 (1906), it has been clear that a governmental body, such as a city, county or state, can be injured in either its "business" or its "property" by a federal antitrust violator. Count II of Hawaii's complaint, which the Court of Appeals improperly dismissed, pleads injury to both Hawaii's "business" and its "property."

The whole purpose of modern federal procedure is to decide cases on their merits, not on the basis of paper pleadings. Thus, to "state a claim upon which relief can be granted under [§ 1 of the Sherman Act] allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are *all* that the law requires." *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656, 660 (1961) (emphasis supplied); *Radovich* v. *National Football League,* 352 U.S. 445, 453-454 (1957); *Knuth* v. *Erie-Crawford Dairy Coop. Assn.,* 395 F. 2d 420, 423 (3 Cir. 1968). If at trial Hawaii can prove *the fact* that its economy was damaged by the defendants' antitrust violations, there is no reason why it

cannot recover. And it is settled antitrust law that once the *fact* of damage is shown, uncertainty as to the amount of damage does not preclude recovery. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946).

As the district judge so rightly recognized, the challenge to Count II of Hawaii's complaint is not even a debatable one. *Georgia* v. *Pennsylvania R. R. Co.,* 324 U.S. 439 (1945), decided the issue in Hawaii's favor. The Court of Appeals thought *Georgia* inapplicable because it dealt only with injunctive relief under § 16 of the Clayton Act, rather than an action for damages under § 4 of that Act (431 F. 2d 1284-1285). Not so.

In *Georgia,* this Court squarely held that the state was a "'person' entitled to enforce the civil sanctions of the antitrust laws," both as "*parens patriae* as well as proprietor," 324 U.S. 452, the claim for damages failing only because of *Keogh* v. *C. & N. W. Ry. Co.,* 260 U.S. 156 (1922). *Keogh* laid down the rule that rates set by the ICC could not be the subject of treble-damage claims. *Georgia, supra,* 324 U.S. at 453. As this Court said: "[W]e find no indication that, when Congress fashioned those civil [antitrust] remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust acts." *Georgia, supra,* 324 U.S. at 447. Thus, as Mr. Justice Douglas's opinion makes crystal clear, save for the rule of *Keogh,* Georgia's complaint stated a proper claim for treble damages. The only difference between *Georgia* and this case is that Hawaii's complaint, unencumbered by *Keogh* considerations, states a claim for treble damages which Georgia could not sustain solely because of *Keogh.*

The Ninth Circuit held that the Clayton Act establishes a right to seek injunctive relief but no right to seek damages for the same injury irrespective of whether damages could be established and quantified. This conclusion attributes to Congress an unstated design at odds with recognized principles of law. The basic remedy for injury to a protected interest is normally money damages. And the availability of any remedy presupposes a right to relief and presupposes the fact of damage. The Ninth Circuit decision concedes that Hawaii may seek an injunction, thereby recognizing this right to relief (431 F.2d 1284-1285) but denies Hawaii a chance to prove that the basic remedy of damages is appropriate. If Hawaii has a right to relief, and there is no dispute that it does, then it has a right to any relief which proves to be appropriate. By denying Hawaii the right to prove damages, the Ninth Circuit has implied that Hawaii has no protected interest, which is at variance with the Ninth Circuit's own decision and with this Court's holding in *Georgia* v. *Pennsylvania R. R. Co.*

The Court of Appeals rested its decision on an alternative ground. Assuming that the alleged injury to Hawaii's economy constituted an injury to the state's "business" or "property," the court held as a matter of law that "such injury is indirect and consequential" and hence not compensable under the antitrust laws (431 F.2d at 1285-1286). In the first place, the court erred in approaching the problem as a matter of law and in failing to distinguish between a situation where, as a matter of fact, the injury impacts *indirectly* on the state and a situation—air pollution is a good example—where, as a matter of fact, the injury impacts *directly* upon the state. *Georgia* v. *Tennessee Copper*

Co., 206 U.S. 230 (1907). In air and water pollution cases and in water and natural gas diversion cases as well, this Court has made clear that injury to the state, as quasi-sovereign, is separate and apart from the related injury to the state's inhabitants. *E.g., Tennessee Copper Co., supra,* 206 U.S. at 337; *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 592 (1923). Whether, and to what extent, a state is able to *quantify* its damages in no way affects the directness of the injury "to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Tennessee Copper Co., supra; cf. Assn. of Data Processing Service Org.* v. *Camp,* 397 U.S. 150, 153-154 (1970).

More importantly, the Court of Appeals misconceived the directness requirement of the antitrust laws. Here, as in *Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969), the Court of Appeals relied on its decision in *Karseal Corp.* v. *Richfield Oil Corp.,* 221 F.2d 358 (9 Cir. 1955). And here, as in *Perkins,* (395 U.S. at 649-650), that reliance was misplaced. As in *Perkins,* Hawaii "was directly injured and was clearly entitled to bring this suit [and] * * * to present evidence of all of [its] losses to the jury." 395 U.S. at 650.

The ruling below that damages to the economy are incidental or remote results from the Ninth Circuit's skepticism about a state's economy as anything other than an abstraction. This Court did not view Georgia's economy as an abstraction in 1945. Since then there have been significant advances in techniques for measuring economies. "Gross National Product" has become a household phrase, and many states now annually measure their "gross *state* product." Economists have

developed models for measuring the effects upon local economies from infusions or extractions of given sums of money from those economies. In short, a state's economy is susceptible of articulation and measurement.

Hawaii's unique geographic situation affords a clear example of an obviously valid "damage to the economy" suit. Tourism, the Court can judicially note, is one of Hawaii's main industries. Because Hawaii is separated from the mainland by 2500 miles of ocean, the only way tourists can visit Hawaii is by use of public transportation. If all transportation companies serving Hawaii unlawfully conspired to fix the price of transportation at such an unreasonably high price that Hawaii could prove that one of its main industries was destroyed, no one, we submit, could seriously challenge Hawaii's ability to sue for treble damages under the federal antitrust acts. Hawaii's damages from such a hypothetical case might include such very obvious factors as loss of airport and hotel tax revenues to less obvious but equally clear factors as the loss of a substantial number of its businesses which were dependent upon tourism. The overall effect on Hawaii's economy would, of course, be the subject of proof at a trial, and on that issue Hawaii would bear the burden. But surely in such a case, Hawaii would not be deprived of its day in court because the damages which it had alleged were damages to its economy.

So here. If Hawaii can prove as a fact that the illegally high prices which the defendants charged for their gasoline and asphalt products injured its economy by, for example, retarding or restricting "manufacturing, shipping and commerce" as it has alleged it can prove, Hawaii will have been damaged by the

defendants' antitrust violations and entitled to recover under the statute. *Cf. Perkins* v. *Standard Oil Co. of California,* 395 U.S. 642 (1969).

As we view it, this case, like the hypothetical, and indeed all cases where public bodies alleged direct injury to their respective economies by virtue of antitrust violations, is a causation case. At this stage of the proceedings, the measure of Hawaii's damages is not at issue. Perhaps the proof will show that Hawaii is entitled to damages because it has been deprived of tax revenues. Perhaps the evidence will support some other theory of damages. But it is the *fact* that Hawaii has been damaged that creates its legal right to recover. And that fact cannot be established save at trial. The district judge correctly ruled that Hawaii was entitled to its day in court. The Court of Appeals, reviewing paper pleadings, not a trial record, held that Hawaii's damage "is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" (431 F.2d at 1285), pointing to Hawaii's alleged inability to "articulate a more precise theory or measure of such damages" (431 F.2d at 1285). Even after full pretrial discovery, litigants are not necessarily required to "articulate a more precise theory," as Judge Charles Clark made clear in *Padovani* v. *Bruchhausen,* 293 F.2d 546 (2 Cir. 1961). *A fortiori,* such "theory pleading" cannot justify dismissal of Hawaii's complaint before pretrial discovery has taken place.

We submit that before this Court fixes the metes and bounds of "injury to the economy" antitrust suits, it ought to have the benefit of a full trial record and the findings, either of a jury or a trial judge. At this stage of the case, we submit that Count II of Hawaii's com-

plaint states a claim which, if proved at trial, entitles Hawaii to relief.

CONCLUSION

By reason of the foregoing, the judgment of the Court of Appeals should be reversed and the case should be remanded to the district court with directions to proceed to trial on Count II of Hawaii's complaint.

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